

BRB No. 97-0855 BLA

ELHANON HELTON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
EASTOVER MINING COMPANY)	DATE ISSUED:
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Fred M. Busroe, Jr., (Carter & Busroe Law Offices), Harlan, Kentucky, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-0046) of Administrative Law Judge Robert L. Hillyard denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge noted that a prior finding of twenty years of coal mine employment was not disputed and adjudicated this duplicate claim pursuant to 20 C.F.R. Part 718.¹ The administrative law judge found that the recent evidence submitted with the instant claim was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c)(1)-(4). The administrative law

¹ Claimant filed his first claim for black lung benefits on February 23, 1974, which was denied on August 28, 1992. Decision and Order at 3; Director's Exhibit 36. Claimant filed the instant claim on December 13, 1994. Decision and Order at 3; Director's Exhibit 1.

judge thus concluded that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding that the recent evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.²

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. In his consideration of the x-ray evidence, the administrative law judge noted that there were eight negative x-ray readings and one positive x-ray reading submitted with the most recent claim and that all eight of the negative x-ray readings were by B-readers, six of whom were also Board-certified radiologists. Decision and Order at 5-6, 8. The administrative law judge thus found that the preponderance of x-ray evidence was negative and rationally accorded greater weight to the preponderance of x-ray interpretations by the readers with superior qualifications. Decision and Order at 8; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). We, therefore, affirm the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

In weighing the medical opinions of record, the administrative law judge also

² The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(c)(1)-(3) are unchallenged on appeal and are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

rationally concluded that this evidence failed to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(4). *Perry, supra*. In so finding, the administrative law judge determined that the opinion of Dr. Baker, diagnosing pneumoconiosis, was based on an inflated coal mine employment history and the sole positive x-ray reading. The administrative law judge acted within his discretion as fact-finder in concluding that Dr. Baker's opinion was outweighed by the medical opinions of Dr. Dahhan, who found that claimant's condition was unrelated to coal mine employment, based on the fact that Dr. Dahhan examined claimant more times, more recently and his opinions were consistent with the objective medical evidence. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985) *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order at 9; Director's Exhibits 13-15. Moreover, claimant's assertion that the opinions of Dr. Dahhan are incongruent with his earlier opinions in the prior claim is without merit inasmuch as Dr. Dahhan did not diagnose pneumoconiosis or total disability due to pneumoconiosis in the earlier reports. Director's Exhibit 36. Inasmuch as the administrative law judge weighed all of the medical opinions and rationally concluded that the preponderance of the evidence did not establish the existence of pneumoconiosis, we affirm the administrative law judge's finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *Clark, supra*; *Perry, supra*; *Lucostic, supra*; *Oggero, supra*.

In considering whether total disability was established pursuant to Section 718.204(c)(4), the administrative law judge permissibly gave diminished weight to the opinion of Dr. Baker since he found that his diagnoses was not supported by the objective evidence of record and the underlying documentation did not support the physician's conclusions. *Clark, supra*; *Lucostic, supra*; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order at 11; Director's Exhibit 13. Consequently, the administrative law judge properly found that the newly submitted medical opinions of record failed to establish total disability pursuant to Section 718.204(c)(4). Furthermore, since the administrative law judge properly found that the medical evidence was insufficient to establish total disability pursuant to Section 718.204(c), lay testimony alone cannot alter the administrative law judge's finding. See 20 C.F.R. §718.204(d)(2); *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). As claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) or total respiratory disability pursuant to Section 718.204(c), essential elements of entitlement, the administrative law judge correctly found that claimant failed to establish a material change in conditions since the prior denial pursuant to Section 725.309(d). *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge